No. 18-422

IN THE

Supreme Court of the United States

ROBERT RUCHO, ET AL.,

Appellants,

—v.—

COMMON CAUSE, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

BRIEF OF COLLEAGUES OF PROFESSOR NORMAN DORSEN AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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QUESTION PRESENTED

Whether an extreme partisan gerrymander that intentionally pre-selects the overwhelmingly likely winner in each of North Carolina's 13 Congressional Districts violates the First Amendment by:

1. discriminating of the basis of viewpoint;
2. imposing depressed levels of campaign funding, speech, and electoral activity typically associated with non-competitive elections; and
3. denying voters of all political stripes the ability to exercise a meaningful personal choice over who is to represent them in the legislature?

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INTEREST OF *AMICI*

Amici, more fully described in an Appendix following this brief, were colleagues of Professor Norman Dorsen, who died peacefully on July 1, 2017.[1] Professor Dorsen devoted his career to the teaching, study and passionate defense of the United States Constitution. His academic career at NYU School of Law spanned fifty-six years, from 1961-2017, culminating as Frederick I. and Grace A. Stokes Professor of Constitutional Law, Co-Director of the Arthur Garfield Hays Civil Liberties Program, and Counsellor to the President of New York University. Professor Dorsen's tireless defense of the United States Constitution included distinguished service from 1969-1991 as General Counsel and then President of the American Civil Liberties Union (ACLU).

In the months preceding his death, Professor Dorsen was engaged in preparing material for submission to this Court opposing the constitutionality of excessive partisan gerrymandering, which he viewed as a paramount threat to American democracy. Sadly, Professor Dorsen died before completing his work. *Amici*

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[1] Blanket consents to the filing of briefs *amici curiae* herein have been filed with the Clerk of the Court by all parties. Counsel represents, pursuant to Rule 37.6, that no party, or counsel for a party, has played a role in the drafting or preparation of this brief *amici curiae*; nor did any person or entity other than *amici* contribute financially to the drafting, preparation, or filing of this brief. This brief reflects the personal views of *amici* and does not purport to express the views of New York University School of Law, or of any other entity or institution.

have pledged, in his memory, to complete Professor Dorsen's unfinished project.

Amici submitted a brief *amici curiae* in *Gill v. Whitford*, No. 16-1165 (June 18, 2018) reflecting many of Professor Dorsen's ideas. Since the constitutional issues posed by extreme partisan gerrymandering are, once again, before the Court in this appeal, *amici*, with the blanket consent of all parties, respectfully submit this brief *amici curiae* further developing Professor Dorsen's ideas in the hope that the Court will find it of assistance in confronting the challenge to American democracy posed by uncontrolled partisan gerrymandering.

SUMMARY OF ARGUMENT

Until very recently, most constitutional challenges to extreme partisan gerrymandering have focused on its unconstitutionally corrosive effect on equality and fair political representation, enabling a transient electoral majority to acquire, exercise, and entrench legislative power significantly in excess of its electoral support in the relevant community. Faced with highly plausible claims that extreme partisan gerrymandering violates the guaranty of equal protection of the laws codified in the 14th Amendment, this Court has repeatedly recognized the practice's unfair and pernicious effects. For more than three decades, this Court has struggled to develop manageable judicial standards that, in the view of a majority of the Court, would enable judges to determine when politically gerrymandered voting and representation is so unfair as to become unconstitutionally unequal. E.g.,

Davis v. Bandemer, 478 U.S. 109 (1986); *Vieth v Jubelirer*, 541 U.S 267 (2004); *LULAC v. Perry*, 548 U.S. 299 (2006).

As Justice Anthony Kennedy recognized in his concurrence in *Vieth*, however, the constitutional harms imposed by extreme partisan gerrymandering do not stop at the Equal Protection Clause. 541 U.S. at 314. See also *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018) (Kagan, J., concurring, joined by Ginsburg, Breyer, and Sotomayor, JJ). In addition to being unconstitutionally unequal under the 14th Amendment, extreme partisan gerrymandering violates three strands of First Amendment doctrine: (1) the First Amendment equality principle that forbids government, in the absence of a compelling justification, from discriminating on the basis of viewpoint, or treating similarly-situated speakers differently, E.g., *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995) (viewpoint); *Citizens United v. Federal Elections Commission*, 558 U.S. 310 (2010) (speaker); (2) the ban on government regulation likely to depress the level of protected First Amendment activity, especially in an electoral context. E.g., *Arizona Free Enterprise Club v. Bennett*, 564 U.S. 721 (2011); *Davis v. Federal Election Commission*, 554 U.S. 724 (2008); and (3) a voter's First Amendment right to exercise a meaningful personal choice over who will speak for the voter in the halls of legislative power. *Terry v. Adams*, 345 U.S. 466 (1953); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). See also *Burdick v. Takushi*, 504 U.S. 428, 446-49 (1992) (Kennedy, J., dissenting).

While natural sorting of the population into contiguous homogeneous political groupings may

make it unduly difficult to draw genuinely contestable electoral districts in certain areas, in settings like North Carolina, a "swing state," where it is eminently feasible to draw district lines rendering the majority of Congressional elections genuinely contestable, the First Amendment does not tolerate a carefully gerrymandered electoral map that discriminates on the basis of viewpoint and locks voters into rigged elections where everyone believes that the highly probable winners and losers have been preselected by officials wielding state power.

Judicially manageable, generally accepted metrics exist in the political science literature that assess the probable contestability of a given election. Briefly put, measured at the commencement of an election campaign, districts displaying a 60/40 partisan spread are deemed uncontestable "landslide" districts; a 55/45 partisan spread creates a virtually uncontestable "safe" district; 54/46 and 53/47 districts tilt in favor of one candidate, but are, nevertheless, "contestable;" while 52/48 districts are statistical ties deemed "swing" districts. [2]

Appellants challenge the accuracy of the predictive literature described *infra* in n.7, pointing out, correctly, that it failed to predict future electoral contestability in *Vieth*. Appellants' Br. at 45. But appellants confuse the difference between absolute certainty and overwhelming probability. A day of rain in the desert does nothing to counteract the overwhelming likelihood that the next day will be dry. Most importantly,

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[2] See *infra* at n.7 for a brief description of the political science literature underlying the classifications.

since the predictive accuracy of the contestability classifications is widely accepted by both political leaders and voters alike, a widespread belief exists, borne out by common sense and experience, that in the overwhelming majority of elections neither "landslide" nor "safe" districts are genuinely contestable. Cf. *Buckley v. Valeo*, 424 U.S. 1, 26 (1976) (recognizing the importance of "appearance" in regulating electoral behavior).

(1)

Extreme partisan gerrymandering is a paradigm violation of the First Amendment duty to treat viewpoints and similarly-situated speakers equally. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972). See generally, Kenneth Karst, *Equality as a Central Principle of the First Amendment*, 43 U. Chi. L. Rev. 20 (1975). The very purpose and effect of an extreme partisan gerrymander is to disadvantage and frustrate the speech, association, and electoral efforts of a disfavored political grouping.

(2)

By pre-ordaining the highly probable electoral outcome, extreme partisan gerrymandering sucks the proverbial First Amendment oxygen out of the campaign process, creating a series of non-competitive electoral boxes within which the level of campaign spending, speech and association is necessarily depressed by the widespread belief that all the speech and association in the world is highly unlikely to alter the outcome of a rigged election. *Arizona Free Enterprise Club v. Bennett*, 564 U.S. 721 (2011); *Davis v. Federal Election Commission*, 554 U.S. 724 (2008).

(3)

At the core of the republican form of government guaranteed by Article IV, section 4 are the First Amendment rights of eligible voters to exercise "an effective voice in the governmental affairs of their country, state or community." *Terry v. Adams*, 345 U.S. 461, 466 (1953) (quoting from the 5th Circuit's rejection of the exclusionary practice). An extreme partisan gerrymander, by minimizing (even eliminating) the occurrence of genuinely competitive elections in a given political unit, unconstitutionally degrades the act of voting by draining it of much of its political power. *Williams v. Rhodes*, 393 U.S. 23, 30 (1968); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

ARGUMENT

THE FIRST AMENDMENT BARS THE NORTH CAROLINA LEGISLATURE FROM:

(1) DISCRIMINATING ON THE BASIS OF VIEWPOINT IN DRAWING VIRTUALLY UNCONTESTABLE DISTRICT LINES CONCEDEDLY DESIGNED TO FAVOR A SINGLE POLITICAL PARTY;

(2) LOCKING AS MANY VOTERS AS POSSIBLE INTO VIRTUALLY UNCONTESTABLE ELECTION DISTRICTS CHARACTERIZED BY DEPRESSED AND UNEQUAL LEVELS OF CAMPAIGN SPENDING, DIMINISHED LEVELS OF POLITICAL SPEECH AND ASSOCIATION, AND DISAPPOINTING LEVELS OF VOTER PARTICIPATION; AND

(3) DENYING NORTH CAROLINA VOTERS A MEANINGFUL PERSONAL CHOICE CONCERNING WHO WILL REPRESENT THEM IN CONGRESS

Introduction and Factual Summary

The court below was confronted with a ruthless partisan gerrymander of all 13 of North Carolina's Congressional Districts that intentionally "packs" many of the state's reliably Democratic voters into three overwhelmingly Democratic "landslide" districts that, predictably, generate massive

pluralities for the Democratic candidate,[3] while carefully spreading most of the state's reliably Republican voters over the remaining 10 Congressional districts, so that, in each of those districts, the Republican candidate, based on voter registration figures and past voting patterns, enjoyed at least a 10 percentage point edge at the commencement of the 2018 Congressional campaign.[4]

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[3] The three "packed" Democratic "landslide" districts are the 1st, with a Democratic edge in the last three Congressional elections of 52, 47, and 40 percent; the 4th, with a Democratic edge in the last three Congressional elections of 49, 56, and 35 percent; and the 12th, with a democratic edge in the last three Congressional elections of 59, 53, and 34 percent. Not surprisingly, in 2018, the Democratic candidates in the three "landslide" districts prevailed by landslides of 70/30; 72/24; and 73/27, respectively. The figures are drawn from https://www.politico.com/2014-election/results/map/house/north-carolina/#.XHQIJC2ZOgQ (last visited February 28, 2019); https://www.politico.com/2016-election/results/map/house/north-carolina/ (last visited February 28, 2019); https://www.politico.com/election-results/2018/north-carolina/ (last visited February 28, 2019).

[4] The ten carefully constructed Republican-leaning districts are the 2nd, with a Republican edge of 14, 18, and 13 percent in the last three Congressional elections; the 3rd, with a Republican edge 26, 36, and 34 percent; the 5th, with a Republican edge of 15, 22, and 17 percent; the 6th, with a Republican edge of 22, 17, and 18 percent; the 7th, with a Republican edge of 22 percent in the last two Congressional elections; the 8th with a Republican edge of 30 and 18 percent in the last two Congressional elections; the 9th with a 16 point Republican edge in the 2016 Congressional election; the 10th, with a Republican edge of 14, 22, and 26 percent in the last three Congressional elections; the 11th with a Republican spread of 15, 26, and 28 percent and the

The conceded purpose and effect of the North Carolina gerrymander was to pre-determine the winner in each of North Carolina's 13 Congressional districts. The plan worked. Despite polling approximately 50% of the vote in the 2018 statewide elections, all four of which were won narrowly by Democrats,[5] Democrats were unable to dent the Republican wall of 10 "safe" or "landslide" Congressional seats, leaving the North Carolina Congressional delegation at 9 Republican-3 Democratic, with one unresolved election that had apparently been won narrowly by the favored Republican candidate rendered void by irregularities in the handling of absentee ballots.[6]

The 2018 results did not come as a surprise. Generally accepted guidelines based on the known attributes of individual voters comprising the electorate, such as past voting patterns and party registration, measure the statistical likelihood

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13th, with a Republican edge of 14, 15, and 12 percent. The figures are drawn from the sources cited in n. 3.

[5] The four state-wide races were judicial elections. According to the official North Carolina vote tabulation, one state Supreme Court race was won by the Democratic candidate with 49.6% of the vote. Three state Court of Appeals races were won by Democratic candidates with 50.8, 48.8, and 48.6% of the vote, respectively. See https://www.wral.com/north-carolina-election-results/17944806/?group=judges (last visited February 28, 2019).

[6] North Carolina election official have ordered a new election in the 9th CD on the basis of mishandling of absentee ballots. Election day tabulations had indicated a 900-vote victory for the favored candidate.

that a given election will be contestable with a high degree of accuracy.[7] As *amici* have noted, 60/40 election districts are generally viewed as "landslide" districts that are virtually certain to elect the favored candidate; 55/45 election districts are "safe" districts that are highly likely to elect the favored candidate; 54/46 and 53/47 districts are deemed "contestable," allowing both sides to entertain a reasonable hope for victory. 52-48 election districts are "swing" districts where each candidate has a virtually equal chance to win.

Thus, a well-executed extreme partisan gerrymander – like the partisan gerrymander of North Carolina's 13 Congressional districts before the Court in this appeal – is nothing less than a

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[7] A massive political science literature discusses the relationship between political gerrymandering and competitive elections. For a useful summary, see Heather K. Evans, *Competitive Elections and Democracy in America: The Good, the Bad, and the Ugly* (2014). See also Keena Lipsitz, *Competitive Elections and the American Voter* (U. Pa. Press 2011). See David R. Mayhew, *Congressional Elections: The Case of the Vanishing Marginals*, 6 Polity 295, 304 (1974) (defining as "reasonably safe" districts in which the majority party routinely captures 55% or 60% of the vote); see also Gary C. Jacobson, *The Electoral Origins of Divided Government: Competition in U.S. House Elections*, 1946-1988, at 26 ("The two thresholds of marginality commonly found in the literature are 55% and 60% of the vote. Winning candidates who fall short of the threshold are considered to hold marginal seats; those who exceed it are considered safe from electoral threats."). A popular practical measure, the Cook PVI, compares "how each district performs at the presidential level compared to the nation as a whole." http://cookpolitical.com/introducing-2017-cook-political-report-partisan-voter-index (last visited February 28, 2019).

successful conspiracy by a transient electoral majority to minimize (even eliminate) the occurrence of genuinely competitive elections in a political unit. While the art of gerrymandering is as old as the Republic itself,[8] its transformation into a dangerous science rests on three modern factors: (1) extraordinary advances in technology making possible the gathering, storage, and manipulation of a wide swath of information revealing the political preferences of individual voters;[9] (2) the unfortunate polarization of our political process, motivating political leaders of both major parties to go to extremes in seeking to gain short-term electoral advantages over political rivals, regardless of the long-term harm to American democracy; and (3) advances in political science making it possible to calibrate the likely degree of competitiveness of virtually any electoral configuration with a high degree of accuracy. See n. 7, *supra*.

If one looks forward in time from an intensely gerrymandered election, one almost always

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[8] The derivation of the phrase dates from Governor Elbridge Gerry's effort to draw 1812 electoral lines in Massachusetts favoring his political allies. In fact, the practice emerged earlier, when Patrick Henry altered the electoral lines in the 1788 Virginia Congressional elections to require James Madison to run against James Monroe. See Elmer C. Griffith, *The Rise and Development of the Gerrymander* (1907).

[9] For a summary of technological changes, see Vann Newkirk II, *How Redistricting Became a Technological Arms Race*, The Atlantic (Oct. 28, 2017), available at https://www.theatlantic.com/politics/archive/2017/10/gerrymandering-technology-redmap-2020/543888/ (last visited February 28, 2019).

observes an unfairly skewed legislature that over-represents the transient electoral majority in control of the gerrymandering process.[10] If one looks backward in time, the landscape is littered with soporific election campaigns characterized by depressed and unequal levels of campaign spending, desultory exercises in speech and association, and disappointing voter turnout.[11] Since rigged election campaigns in intensely gerrymandered districts are: (1) concededly intended to distribute electoral benefits and burdens unfairly on a viewpoint-based basis; (2)

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[10] The partisan gerrymander before the Court in this appeal took an evenly divided North Carolina electorate and intentionally produced a 2016 Congressional delegation consisting of 10 Republicans and 3 Democrats, and a 2018 Congressional delegation of 9 Republicans and 3 Democrats, with one district undecided pending a new election due to the improper handling of absentee ballots.

[11] Applying the generally accepted guidelines measuring an election's competitiveness, not a single North Carolina Congressional election district would qualify as "swing" or "contestable." Viewing the elections as of the commencement of the 2018 campaign, the 1st, 3rd, 4th, 7th, 10th, 11th, and 12th were at least 60/40 "landslide" districts; and the 2nd, 5th, 6th, 8th, 9th, and 13th were at least 55/45 "safe" districts. Even the currently undecided 9th CD, where a Democrat almost closed the "safe" seat gap, appears to have validated the statistical prediction that the 55/45 favored candidate would win, albeit by less than one thousand votes. While it is not impossible to "flip" a "landslide" or a "safe" district, (it may happen in the 9th CD), it happens rarely, usually because of a local scandal, a national crisis, population shifts, or a surge in the voter participation of newly enrolled voters. Perhaps most importantly, landslide and safe districts have the appearance of inevitability that is fatal to a robust campaign. See *Buckley*, 424 U.S. at 28 (recognizing that the "appearance" of corruption justifies limiting the size of campaign contributions).

naturally characterized by depressed levels of political activity because they take place against the widespread belief that all the speech and association in the world is highly unlikely to affect the outcome; and (3) destructive of the power of voters of all political stripes to exercise a meaningful personal choice over who will serve as their representatives, the decision by appellants to lock every Congressional voter in the State of North Carolina into 13 airless, non-competitive electoral boxes unconstitutionally burdens the First Amendment rights of winners and losers alike.

Accordingly, *amici* urge the Court to recognize that the First Amendment bans excessive partisan gerrymandering in settings where it is eminently feasible to substitute "swing" or "contestable" election districts for the steady diet of "landslide" and "safe" districts produced by partisan political leaders in full flight from the inconvenience of competitive elections at the heart of a republican form of government.

1. The Legal Background of Challenges to Excessive Partisan Gerrymandering

This is the sixth time that the constitutionality of political gerrymandering has been before this Court in a plenary proceeding. *Gaffney v. Cummings*, 412 U.S. 735 (1973) (upholding bi-partisan gerrymandering designed to reflect the partisan make-up of the electorate); *Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (recognizing that extreme partisan gerrymanders are unconstitutional when they "consistently degrade a voter's...influence on the political process as a whole." (plurality opinion of White, Brennan,

Marshall and Blackmun, JJ);[12] *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (modifying *Davis*; declining to consider 14th Amendment-based challenges to excessive partisan gerrymandering in the absence of an objective baseline of representative fairness from which to measure deviation, but holding open the possibility that a judicially administrable standard may arise under the First Amendment);[13] *LULAC v. Perry*, 548 U.S. 299

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[12] Six members of the *Davis v. Bandemer* Court ruled that 14th Amendment-based claims of excessive partisan gerrymandering pose a justiciable case and controversy. 478 U.S. at 125. The six divided over whether the Indiana gerrymander before the Court violated the Equal Protection rights of Democratic voters. Justices White, Brennan, Marshall and Blackmun held that the evidence before the District Court did not demonstrate a sufficient interference with Democratic voters' ability to play a significant role in the choice of representatives to constitute a denial of the equal protection of the laws. 478 U.S. at 129. Justices Powell and Stewart would have affirmed the District Court's finding of unconstitutionality based on a showing of a purposeful state effort to disadvantage Democratic voters that was carried out in violation of traditional apportionment criteria. 478 U.S. at 176. Justice O'Connor, joined by Chief Justice Burger and Justice Rehnquist, argued that 14th Amendment partisan gerrymandering claims posed non-justiciable political questions. 478 U.S. at 160.

[13] Four members of the *Vieth* Court – Justices Scalia, Chief Justice Rehnquist, and Justices O'Connor and Thomas – flatly rejected the justiciability of partisan gerrymandering claims. 541 U.S. at 305. Four Justices – Justices Stevens, Souter, Ginsburg and Breyer – insisted that 14th Amendment-based partisan gerrymandering claims were justiciable, albeit under three differing standards. 541 U.S. at 326 (Stevens, J); *Id.* at 346 (Souter J, joined by Ginsburg, J; and *Id.* at 365 (Breyer, J.). Justice Kennedy cast the swing vote, agreeing that 14th Amendment-based partisan gerrymandering claims are

(2006) (declining to rule on the justiciability of partisan gerrymandering challenges; rejecting challenge to mid-census reapportionment; granting partial relief under Section 2 of the Voting Rights Act);[14] and *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (unanimously vacating and remanding 14th Amendment equality-based challenge to statewide partisan gerrymander to ascertain whether any named-plaintiff suffered a cognizable injury).[15]

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non-justiciable in the absence of an objective definition of political fairness to act as a baseline against which to measure a given gerrymander, but holding out the prospect of justiciable First Amendment-based challenges that rest on the substantive quality of electoral participation. 541 U.S. at 314.

[14] Justice Kennedy, writing for the *LULAC* Court, explicitly declined to consider whether partisan gerrymandering claims are justiciable, continuing the uncertainty that reigns after *Davis* and *Vieth*. 548 U.S. at 423. Two Justices, Chief Justice Roberts and Justice Alito, ruled that the challengers had failed to provide a judicially-manageable standard, but declined to consider the issue generally. 548 U.S. at 492. Two Justices, Scalia and Thomas, argued that partisan gerrymandering claims are non-justiciable. 548 U.S. at 511. Four Justices, Stevens, Souter, Ginsburg and Breyer continued to argue that partisan gerrymandering claims are justiciable. 548 U.S. at 447, 485-86, and 492.

[15] Two Justices, Thomas and Gorsuch, would have dismissed rather than remand. 138 S.Ct. at 1941. Four Justices, Kagan, Breyer, Ginsburg and Sotomayor, issued a concurring opinion discussing possible justiciable First Amendment challenges. *Id.* at 1939-40. A seventh plenary case, *Benisek v. Lamone*, 138 S.Ct. 1942 (2018), challenging a Democratic gerrymander of a single Maryland Congressional District on First Amendment grounds, was also disposed of on procedural grounds without consideration of the merits. The Court, acting *per curiam*,

Until very recently, challengers relied solely on the 14th Amendment to argue that excessive partisan gerrymandering generates unconstitutionally distorted representational outcomes that intentionally deprive a disfavored group of voters of their fair share of electoral representation.[16] Challengers have struggled unsuccessfully for more than three decades to develop manageable judicial standards acceptable to the Court's majority that would enable judges to determine when politically gerrymandered representation becomes so skewed as to be unconstitutionally unfair.[17] More recently, as in

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unanimously upheld the District court's denial of preliminary injunctive relief without reaching the merits because insufficient time existed to alter the district lines before a forthcoming election. *Id.* at 1945. The Maryland case is once again before the Court on the merits. *Lamone v. Benisek*, No 18-726.

[16] For example, in *Davis v. Bandemer*, the challengers complained that the gerrymander of the Indiana state legislature had enabled the Republican Party to parlay approximately 48% of the statewide vote into 57 of the 100 seats in the lower house; and approximately 47% of the statewide vote into 12 of 25 state senate seats. 478 U.S. at 115. In *Vieth*, one set of plaintiffs challenged only the statewide representational distortion without challenging any particular district. 541 U.S. at 296. One plaintiff complained of an irregularly drawn district but focused solely on the representational distortion caused by the gerrymander. *Id* at 297. In *Gill*, the parties were so focused on statewide representational distortion that they failed to identify any plaintiff with standing to challenge a particular election, requiring a remand to explore the standing issue. 138 S. Ct. at 1933.

[17] In *Davis v. Bandemer*, six members of the Court propounded two standards – the plurality asked whether the gerrymander "consistently degrade[d] a voter's ... influence on the political process as a whole." 478 U.S.

this appeal,[18] challengers have argued that not only does excessive partisan gerrymandering unconstitutionally taint the representational fairness of the ensuing legislature, it violates the First Amendment in three ways by: (1) flouting the First Amendment equality principle; (2) unconstitutionally degrading the quality and quantity of First Amendment activity associated with the intensely gerrymandered elections;[19] and

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at 132. Justices Powell and Stevens asked whether the gerrymander was an intentional effort to diminish the representation of a political rival carried out in violation of traditional districting criteria. *Id.* at 185. In *Vieth*, Justices Souter and Ginsburg applied a modified *Davis* plurality standard, criticizing the lower courts for requiring a showing that a challenger's electoral rights had been all but extinguished. They would have asked whether electoral opportunities had been significantly eroded intentionally. 541 U.S. at 347-50. Justice Stevens re-asserted his *Davis* standard. *Id.* at 333. Justice Breyer asked whether the partisan gerrymander intentionally eroded principles of representative fairness inherent in American democracy. *Id.* at 365. In *Gill*, the challengers relied on a sophisticated mathematical model to determine whether a statewide minority had been "packed" into districts in an intentional effort to "waste" the electoral significance of their votes. 138 S. Ct. at 1923-24.

[18] In this case, the challengers have launched both an equality-based challenge to representational distortion and a First Amendment-based challenge to electoral degradation. The three-judge court below accepted both theories. See *Common Cause v. Rucho*, 318 F. Supp.3d 777, 800-01 (M.D. N. Car. 2018).

[19] A similar decision whether to look forward or backward from a violation of the one-person one-vote principle was made by this Court in the cases following *Baker v. Carr* 369 U.S. 186 (1962). *Baker* and *Reynolds v. Sims*, 377 U.S. 533 (1964) looked backward to the malapportioned election, noting the mathematical

(3) undermining the power of the ballot by shifting the real power to choose the winner of an election to someone other than the eligible voters themselves. *Terry v. Adams*, 345 U.S. 461 (1953) (invalidating shift of power to choose almost certain winner to private hands); *California Democratic Party v. Jones*, 530 U.S. 567 (2000) (invalidating "blanket" primary giving too much power to non-party members to select nominee.)

2. Extreme Partisan Gerrymandering Violates the First Amendment Equality Principle

The court below recognized that appellants violated the First Amendment equality principle by engaging in viewpoint discrimination and intentionally imposing disparate treatment on similarly situated speakers. 318 F. Supp. 3d at 935. It is no answer for appellants to argue that shifting the legal lens from 14th Amendment equality to First Amendment equality fails to provide a reasonably objective baseline of fairness against which to measure an allegedly unequal gerrymander. Such an argument overlooks a fundamental analytic difference between a 14th Amendment equality challenge, and a challenge grounded in the First Amendment equality principle.

As the Court noted in *Vieth*, a 14th Amendment equality-based challenge to extreme partisan

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disparity in the value of votes cast in a malapportioned setting. In later one-person one-vote cases, the Court unanimously declined to hold that a legislature operating with weighted voting would cure the inequality at the electoral level. See *Board of Estimate v. Morris*, 489 U.S. 688 (1989).

gerrymandering requires a court to construct a subjective baseline of electoral fairness against which to measure an allegedly unconstitutional deviation. While that process is eminently feasible in the one-person one-vote context of *Baker v. Carr*, 369 U.S. 186 (1962) and its progeny, where the mathematical value of one person's vote provides an objective baseline against which to measure the mathematical value of a challenger's vote, constructing an objective baseline of fairness has proven elusive in the context of partisan gerrymandering, where identifying a baseline of "fair representation" often involves a series of subjective judgments. But no such analytic impediment confronts a judge in a First Amendment equality case. Under clearly established First Amendment doctrine, this Court has repeatedly held that the differential treatment by the state of viewpoints or similarly-situated speakers triggers First Amendment strict scrutiny, without the necessity of constructing a baseline grounded in a judge's necessarily subjective view of fairness. *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995) (viewpoint); *Citizens United v. Federal Elections Commission*, 558 U.S. 310 (2010) (speaker).[20]

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[20] For additional examples of the enforcement of the First Amendment equality principle, see *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972) (discrimination between speech about labor and everything else); *Carey v. Brown*, 447 U.S. 455 (1980) (same); *Widmar v. Vincent*, 454 U.S. 263 (1981) (discrimination between religious and secular speech) *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1983) (same); *Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (differential treatment of

In fact, the only baseline required in a First Amendment equality case is a description of the treatment afforded by the state to the favored viewpoint or speaker. That favorable treatment then forms the objective baseline against which to compare the treatment afforded to a disfavored viewpoint or speaker.

Thus, in *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995), a state University subsidized secular student speech but refused to provide similar support for student speech of a religious character. In deciding whether the First Amendment equality principle had been violated, this Court used as its baseline the University's favorable treatment of secular speech and found that the University was treating speech with a religious viewpoint less favorably, thereby triggering First Amendment strict scrutiny. 515 U.S. at 845-46. Similarly, in *Citizens United v. FEC*, 558 U.S. 310 (2010), in the wake of *Buckley v. Valeo*, 424 U.S. 1 (1976), federal statutes permitted flesh-and-blood individuals to make unlimited independent expenditures seeking to affect the outcome of a federal election but absolutely forbade corporations from expending treasury funds in connection with a campaign for federal office. In assessing the corporation's First Amendment claim, this Court used as its baseline the favored treatment of individuals and ruled that since the statute was treating one set of speakers (corporations), less favorably than

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similarly-situated speakers); *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987) (same); *RAV v. City of St. Paul*, 505 U.S. 377 (1992) (viewpoint discrimination); *Virginia v. Black*, 538 U.S. 343 (2003) (same).

another set of speakers, (individuals), the corporate ban was reviewable under First Amendment strict scrutiny. 558 U.S. at 340 (applying First Amendment strict scrutiny).

In this case, the North Carolina legislature has imposed a massive state-wide gerrymander that intentionally favors Republican Congressional candidates and voters over Democratic candidates and voters by constructing 13 electorates that will, to the maximum extent possible, allow Republican voters to elect the largest number of representatives of their choice, while rendering it difficult or impossible for disfavored Democratic voters to enjoy an equal political opportunity for representation. Applying *Rosenberger* to the viewpoint discrimination inherent in the gerrymander, and *Citizens' United* to the dis-parate treatment of similarly-situated speakers inherent in appellants' intentional decision to favor adherents of one political party over another, the objective judicially manageable baseline in this case is North Carolina's highly favorable treatment of Republican voters, allowing a court readily to determine whether Democratic voters are being treated substantially less favorably.

Once such differential viewpoint or speaker-based treatment is found to exist, classic First Amendment doctrine set forth in *Rosenberger* and *Citizens United* requires North Carolina to demonstrate that its decision to treat Republican and Democratic voters differently is necessary to advance one or more compelling state interests by the least drastic means. 558 U.S. at 340. It is, of course, impossible for North Carolina to meet such a burden of justification. No legitimate – much less compelling – state interest exists that can

justify the state's blatant discrimination against Democratic candidates and voters.

3. Extreme Partisan Gerrymandering Inevitably Degrades the Quantity and Quality of Intensely Protected Electoral Speech

This Court has repeatedly invalidated well-intentioned efforts to improve the democratic process because the reform proposal before the Court would – or even might – depress the quantity and quality of intensely protected electoral speech. E.g., *Miami Herald v. Tornillo*, 418 U.S. 241, 256-57 (1974) ([faced with a duty to print a reply] the "editors might well conclude that the safe course is to avoid controversy." As a result, [the government-enforced] "right of access inescapably damages the vigor and limits the variety of public debate..."); *Buckley v. Valeo*, 424 U.S. 1 (1974) (campaign spending limits would depress electoral speech); *Citizens United v. FEC*, 558 U.S. 310 (2010 (denying corporations the ability to speak during an election campaign would deprive voters of potentially valuable information); *Davis v. FEC*, 554 U.S. 724 (2008) (allowing candidates access to relaxed campaign contribution limits to offset the advantage of significant campaign spending by an extremely wealthy opponent might deter the wealthy candidate from expending money to produce speech); *Arizona Free Enterprise Club v. Bennett*, 564 U.S. 721 (2011) (dollar-for-dollar match invalid because it would deter fundraising, and thus speech, by the privately-funded candidate); *McCutcheon v. FEC*, 572 U.S. 185 (2014) (invalidating generous cap on total campaign contributions to federal candidates in a single

election cycle because it deterred "full-throated" electoral speech).

In *Arizona Free Enterprise Club v. Bennett*, 564 U.S. 721 (2011), Chief Justice Roberts wrote for a five-justice majority in invalidating an Arizona public financing program that provided a publicly-funded candidate with a dollar-for-dollar match of campaign funds raised by a privately-funded opponent. The Chief Justice predicted that the knowledge that each dollar raised privately would result in a dollar-for-dollar match to the candidate's publicly-funded opponent would deter the level of protected fundraising and expenditure by privately funded candidates. 564 U.S. at 745-46. When asked to provide empirical support for the assertion that Arizona's matching plan would, in fact, deter the robust exercise of fundraising and spending by privately-funded candidates, the Chief Justice responded:

> The burden imposed by the matching fund provision is *evident* and *inherent* in the choice that confronts privately funded candidates...we do not need empirical evidence to determine that the law is burdensome. 564 U.S. at 745-46 (emphasis added) (citing *United States v. Davis*, 554 U.S. at 738-40 ("requiring no evidence of a burden whatsoever" caused by differential contribution rules triggered by massive campaign spending by an extremely wealthy candidate).

The burden on robust electoral speech and association imposed by intentionally locking every Congressional voter in North Carolina into carefully rigged elections, where the voters

believe that their speech, association, and campaign contributions almost certainly cannot affect the election's outcome, is far greater than the deterrent impact on electoral speech imposed by the regulations in *Tornillo*, *Davis*, and *Arizona Free Enterprise*.[21] Experience and common sense teach that elections conducted inside a state-designed airless box of apparent inevitability are pale shadows of the real thing. Whenever government has acted to "chill" the "full-throated" exercise of First Amendment freedoms in the context of an election, this Court has condemned the government action as violative of the First Amendment. The "evident," "inherent," and "inescapable" "chilling effect" on protected campaign activity caused by excessive partisan gerrymandering is no different.

The court below recognized that extreme partisan gerrymandering sucks the proverbial

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[21] This Court has held that the reasonable perception of the electorate is an important measure of First Amendment applicability. Thus, in *Buckley*, the Court upheld the constitutionality of limits on the size of campaign contributions based on the "appearance" of corruption inherent in unregulated contributions. 424 U.S. at 26. The lack of such an "appearance" of corruption doomed efforts to restrict independent expenditures by individuals and, eventually, corporations. 424 U.S. at 45. Similarly, the lack of an appearance of corruption (defined narrowly as *quid pro quo* bribery) doomed the generous ceiling on aggregate campaign contributions in a single election cycle. *McCutcheon*, 572 U.S. at 227. The "appearance" of inevitability perceived by the electorate in a landslide (60/40) or a "safe" (55/45) district is far more intense that the diffuse "appearance" of corruption relied on by this Court in *Buckley*, *Citizens United*, and *McCutcheon*.

First Amendment oxygen out of the electoral campaign process, leaving a series of airless, non-competitive electoral boxes inside which campaign speech and association are inescapably depressed. No one – not even the pre-ordained winner – can get terribly excited about competing in a rigged horse race – or campaigning vigorously in a legislative election that appears to have the winner pre-ordained by the state.

In *Buckley*, the Court invoked the metaphor of an automobile to explain why campaign spending should be treated as "pure" speech. Campaign money to a candidate, the Court reasoned, is the equivalent of fuel in the driver's gas tank. 424 U.S. at 19, n. 18. When, however, the driver in *Buckley* is forced by the state to "compete" in a race with an apparently preordained winner, how many people will be interested in buying tickets to watch it, cheering on the drivers, or paying to put gas in the loser's tank? [22]

Fund-raising by both candidates in a rigged election that appears hopeless is inevitably inhibited and skewed.[23] The disfavored candidate

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[22] The chilling effect of perceived inevitability is not unique to the electoral arena. On January 2, 2019, Senate Majority Leader Mitch McConnell stated, "The Senate will not waste its time considering a Democratic bill which cannot pass this chamber and which the President will not sign." https://www.reuters.com/article/us-usa-shutdown-mcconnell/senate-will-not-consider-house-democratic-bills-to-end-shutdown-republican-mcconnell-idUSKCN1OX01I (last visited February 28, 2019).

[23] This Court has repeatedly noted that less campaign money translates into less campaign speech – with a well-informed electorate the loser. *Buckley*, 424 U.S. at 39;

will find it difficult if not impossible to persuade prospective contributors and independent supporters to expend substantial sums on supporting a candidate who is almost certainly doomed to lose. The favored candidate will find it difficult, as well, to persuade donors or independent supporters to spend their money on a sure thing, when the funds could be spent on affecting the outcome in a genuinely contestable race.

The speech and associational activities[24] associated with spirited campaigns for office are also virtually certain to be depressed. Perceived pre-ordained losers find it difficult, if not impossible, to mobilize volunteer support for an apparently doomed candidacy. Sporadic protests and resigned calls for change there may be; but never "full throated speech," with the quality and intensity of electioneering powered by a plausible hope that the election can be won.

Pre-ordained winners suffer, as well. Campaign organizers will find it difficult or impossible to motivate complacent supporters who see no reason to devote substantial time and energy to supporting a candidate who does not appear need their support.

Citizens United, 558 U.S. at 333; *McCutcheon*, 572 U.S. at 197.

[24] The Court has defined the First Amendment's associational right as "that freedom to associate with others for the common advancement of political beliefs and ideas" and has ranked it as "a basic constitutional freedom." *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973)

Finally, voter participation will plummet.[25] Why bother to vote when the outcome appears to be a foregone conclusion?

It is, of course, no answer to argue that depressing electoral speech or voting in a "landslide" or a "safe" district causes little real harm because speech and voting is highly unlikely to have much impact in a carefully gerrymandered district. In fact, imposing a soporific electoral climate on a political unit risks freezing the intellectual and political *status quo*, not merely in a single election but for the foreseeable future; and not merely in a single district, but in the entire gerrymandered region. A diet of extreme gerrymandering and uncontestable elections makes it difficult, if not impossible, to generate the level of political and intellectual ferment capable of challenging the *status quo*. See Bertrall Ross, *Partisan Gerrymandering, the First Amendment, and the Political Outsider*, 118 Colum. L. Rev. 2187 (2018). Just as incumbents cannot be beaten unless challengers are free to raise enough money to mount a substantial challenge, the intellectual and political *status quo* risks being frozen in place in the absence of a robust free

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[25] North Carolina, a swing state where statewide races for Presidential electors and the governorship enjoy a relatively high voter turnout in excess of 50%, sometimes reaching 60%, experiences extremely low voter turnouts in connection with its highly predictable gerrymandered Congressional elections. In 2018, while the nationwide turnout in the Congressional election was 58%, not a single gerrymandered North Carolina Congressional election reached 50% of the eligible electorate. See *supra* n. 3 for 2018 North Carolina voting results.

market in ideas associated with competitive elections.

Whenever government has acted to "chill" the "full-throated" exercise of First Amendment freedoms in the context of an election, this Court has condemned the government action as violative of the First Amendment. The "evident," "inherent," and "inescapable" "chilling effect" on protected campaign activity caused by excessive partisan gerrymandering is no different.

4. Extreme Partisan Gerrymandering Unconstitutionally Degrades a Voter's First Amendment Right to Play a Significant Role in Choosing the Agent Who Will Speak for the Voter in the Legislature

This Court has recognized that voters are entitled under the Constitution to exercise "an effective voice in the governmental affairs of their country, state or community." *Terry v. Adams*, 345 U.S. 461, 466 (1953) (rejecting the idea that casting a formal vote is the equivalent of exercising a meaningful choice). When, as here, the electorate has been artificially constructed by the state so that the overwhelmingly likely winners and losers are never in serious doubt, voting itself is intentionally degraded from a powerful instrument of individual choice to an after-the-fact acknowledgment of a *fait accomplis*.

The votes cast for a pre-ordained losing candidate are more accurately characterized as expressions of protest than as "effective" exercises

in political power.[26] The pre-ordained winners' votes are downgraded from "an effective voice in the affairs of their country, state or community" into gestures of acquiescence in an electoral choice already made for them by the state.[27]

In *Burdick v. Takushi*, 504 U.S. 428 (1992), the Court rejected the idea that voting was an exercise of "pure speech." 504 U.S. at 432-33. *Amici* believe that the expansive definition of "pure speech" adopted by the Court in many other electoral settings calls the *Burdick* holding into question. It is, to say the least, anomalous to grant First Amendment protection to virtually every form of electoral activity leading up to the climactic moment of casting an informed ballot, but to withdraw First Amendment protection from the act of speech and association at the core of the casting a ballot.

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[26] Protest votes in rigged elections are, of course, not worthless. As Justice Brandeis taught us in his concurrence in *Whitney v. California*, 274 U.S. 357, 377 (1927), they are important as assertions of self-definition and human dignity; but they are far from an exercise of genuine self-government based on informed choice that rests at the core of representative democracy and a republican form of government. See Vincent Blasi, *The First Amendment and the Idea of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 Wm & Mary L. Rev. 653 (1988).

[27] It is no answer to claim that the winning voter may have had an opportunity to exercise choice during the nomination process, which is often riddled with obstacles that include closed primaries in many states, some with durational waiting requirements as long as 11 months; financial barriers; ballot access restrictions; and low turnouts. In any event, a primary is an adjunct to an election, not a substitute for it.

It is, however, unnecessary to overrule *Burdick* to recognize that extreme partisan gerrymandering robs voters of a genuine "choice in the election of those who make the laws under which, as good citizens, they must live." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). As Justice Black concluded in *Wesberry*: "Other rights, even the most basic, are illusory if the right to vote is undermined." All nine members of the *Burdick* court agreed that the ability to exercise an "effective choice" is at the constitutionally protected core of casting a ballot. 504 U.S. at 430. What divided the Court in *Burdick* was whether Hawaii's refusal to permit voters to cast write-in ballots unconstitutionally eroded that choice.

Writing for six members of the Court, Justice White reasoned that Hawaii's extremely liberal ballot access laws assured voters the ability to exercise a wide and effective choice. 504 U.S at 438-39. Justice Kennedy, joined by Justices Stevens and Blackmun, dissented, arguing that write-in ballots were an important aspect of exercising a voter's free choice. 504 U.S. at 442.

Amici believe that all nine members of the *Burdick* court would have agreed that voting in election districts where the outcomes have been almost certainly pre-ordained by the legislature could not be called an "effective exercise of political power" within the meaning of *Terry v. Adams*, or a "choice in the election of those who make the laws" in the words of Justice Black in *Wesberry*. Accordingly, *amici* urge the Court to hold explicitly what it has often recognized

implicitly[28] – that the freedom to exercise a meaningful choice about who will serve as a voter's representative in the halls of power is not merely protected by the fundamental rights prong of the 14th Amendment's guaranty of equality,[29] but by both the First Amendment and the guaranty of a republican form of government. [30]

In the early years of American democracy, voting was physically an exercise of speech, with voters orally expressing their choice of representative in public, or publicly submitting a ballot vividly decorated to reflect its party or

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[28] See e.g., *Williams v. Rhodes*, 393 U.S. 23, 30 (1968); *Anderson v. Celebreeze*, 460 U.S. 780, 789 (1983)

[29] See *Harper v. Virginia Bd of Elections*, 383 U.S. 663 (1966) (invalidating poll taxes); *Kramer v. Union School District*, 395 U.S. 621 (1969) (recognizing equal right to vote in elections affecting prospective voter); *Dunn v. Blumstein*, 405 U.S. 330 (1972 (invalidating durational residence requirements for voting)

[30] *Amici* acknowledge that settings may arise where it is not possible to draw "contestable" or "swing" districts without compromising important neutral principles governing apportionment. It is unnecessary in this case to determine the precise point at which natural sorting makes it unduly disruptive to draw competitive election districts because it is clearly possible to render some or all of North Carolina's Congressional districts genuinely competitive without disturbing traditional apportionment criteria like one person-one vote, compactness and contiguity. When non-competitive elections derive from natural sorting, no constitutional issues are raised because state action is absent. The Constitution is violated only when the state imposes non-competitiveness when competitive elections are eminently feasible.

candidate.[31] In the late 19th century, the "secret ballot" replaced *viva voce* voting in order to protect vulnerable voters from external pressures about how their free choice was to be exercised.[32] But the communicative nature of the vote remained intact – with the communication becoming anonymous and directed to the official charged with declaring the winner. Accordingly *amici* urge the Court to acknowledge the communicative act at the heart of casting a ballot, and to begin the process of developing the appropriate level of First Amendment protection of the right to vote.[33]

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[31] See Donald A. Debats, *How America Voted: By Voice*, and *How the Other Half Voted: The Party Ticket States*, available at sociallogic.iath.virginia.edu (University of Virginia)

[32] For the history of the adoption of the Australian ballot, see L.E. Fredman, *The Australian Ballot: The Story of an American Reform* (Michigan State University Press, 1968).

[33] It is not necessary in this case to determine whether such a communicative act is entitled to the highest level of First Amendment protection available to pure speech, or whether intermediate First Amendment scrutiny available to "speech brigaded with action" is more appropriate. Compare *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning as an act of protest constitutes pure speech entitled to the highest level of free speech protection) with *O'Brien v. United States*, 391 U.S. 367 (1968) (draft card burning constitutes communicative conduct entitled to intermediate First Amendment protection). The extreme example of partisan gerrymandering before the Court in this appeal clearly flunks both strict and intermediate First Amendment scrutiny because it lacks a legitimate state interest, much less a compelling or substantial one.

CONCLUSION

The quality and intensity of a voter's First Amendment participation in the electoral process – listening to the candidates; choosing a preferred candidate; working with others in support of that candidate; and casting a ballot for a candidate of choice – is deeply dependent on the voter's belief that that it is the voters themselves who are empowered to decide who will win an election. Extreme partisan gerrymanders destroy that belief. The decision of the court below should be affirmed.

Dated: New York, New York
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Appendix Describing *Amici Curiae*

Aryeh Neier served as Executive Director of the ACLU from 1970-1978. He worked closely with Professor Dorsen on issues of international human rights as Vice Chair and Executive Director of Human Rights Watch from 1978-1993, and President, and President Emeritus of the Open Society Foundations from 1993- 2017.

John Shattuck served as Legislative Director of the ACLU from 1976-1984. Ambassador Shattuck worked closely with Professor Dorsen to advance democracy as President and Rector of Central European University in Budapest from 2009-2016, Assistant Secretary of State for Democracy, Human Rights, and Labor from 1993-1998, and United States' Ambassador to the Czech Republic from 1998-2000.

John Sexton is the Benjamin Butler Professor of Law, Dean Emeritus of NYU School of Law, and President Emeritus of New York University. President Sexton worked closely with Professor Dorsen, who served from 1988-2015 as his Counsellor as Dean and University President.

Helen Hershkoff is the Herbert M. and Svetlana Wachtell Professor of Constitutional Law and Civil Liberties at NYU. She served with Professor Dorsen as Co-Director of the Arthur Garfield Hays Civil Liberties Program, and as Associate Legal Director of the ACLU from 1988-1995.

Sylvia Law is the Elizabeth K. Dollard Professor of Law, Medicine, and Psychiatry at NYU. She served with Professor Dorsen as Co-Director of the Arthur Garfield Hays Program,

and worked closely with him in founding Society of American Law Teachers.

Nadine Strossen is the John Marshall Harlan II Professor of Law at New York Law School. She succeeded Professor Dorsen as President of the ACLU, serving from 1991-2008.

Stephen Gillers is the Elihu Root Professor of Law at NYU. He worked closely with Professor Dorsen on issues related to Professional Responsibility and legal ethics.

Martin Guggenheim is the Fiorello LaGuardia Professor of Clinical Law at NYU. He worked closely with Professor Dorsen on the development of clinical education and protection of the rights of children.

Gara LaMarche served as Associate Director of the New York Civil Liberties Union and, from 1984-88, as Executive Director of the Texas Civil Liberties Union. He worked closely with Professor Dorsen on democracy-related issues while at the Open Society Institute and as President of Atlantic Philanthropies.

Burt Neuborne served as Assistant Legal Director of the ACLU from 1972-1974, and as National Legal Director from 1981-1986. He worked closely with Professor Dorsen in defense of civil liberties for more than 50 years and serves as the inaugural Norman Dorsen Professor in Civil Liberties at New York University School of Law.